Exhibit 4

Verlanga, et al. v. Univ. of San Francisco,

Case No. CGC-20-584829 (San. Fran. Sup. Ct. Nov. 12, 2020)

Prepared by Court

FILED
San Francisco County Superior Court
NOV 12 2020
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAMANTHA VERLANGA, JASMINE MOORE and AMBER KAISER, individually and as representatives of their class,

Plaintiffs,

vs.

UNIVERSITY OF SAN FRANCISCO,

Defendant.

Case No. CGC-20-584829

ORDER ON DEFENDANT UNIVERSITY OF SAN FRANCISCO'S DEMURRER TO COMPLAINT

Defendant University of San Francisco's demurrer to the complaint came on regularly for hearing before the Hon. Ethan P. Schulman, on November 12, 2020 at 9:30 a.m. in Department 302. Both parties appeared via videoconference by their counsel of record.

The Court, having considered the papers and pleadings filed in connection with the motion, and the arguments of counsel presented at the hearing, and good cause appearing therefor, hereby rules as follows:

Defendant University of San Francisco's demurrer to the complaint is overruled as to the first cause of action for breach of contract, sustained with leave to amend as to the second cause of action for violation of the Unfair Competition Law and without leave to amend as to the third cause of action for conversion, and sustained with leave to amend as to the fourth cause of action for quasi-contract and the fifth cause of action for promissory estoppel.

FACTUAL ALLEGATIONS

This is a putative class action on behalf of all California citizens who paid tuition and other fees for the Spring 2020 academic semester at USF and who, because of USF's response to the global COVID-19 pandemic, did not receive the full benefit of the educational services, facilities, and other services for which they allegedly contracted and paid. Plaintiffs Samantha Berlanga and Jasmine Moore, both undergraduates at USF, allege they were each charged approximately $26,000 in tuition and fees to attend USF in person for the Spring 2020 semester, which began on January 21, 2020 and ended with final exams around May 14, 2020. Plaintiffs allege that effective March 11, 2020, USF suspended all classes and closed its campus because of the pandemic; that students were notified that they needed to vacate their residence halls no later than March 21, 2020; and that USF has not held any in-person classes since March 11, 2020, but instead has moved all educational instruction online (so-called "distance learning"). Plaintiffs allege that the online learning options offered to USF students are "subpar" and "deprive students of the full university learning experience, because of the lack of facilities, materials, and access to faculty"; and that online learning has deprived them of "the opportunity for collaborative learning and in-person dialogue, feedback and critique" and of "the full academic and social university experience" for which they paid. Plaintiffs allege further that USF has announced that it will not refund any tuition or fees for the Spring 2020 semester. They seek a refund of tuition for in-person educational services, facilities, access and/or opportunities that USF has not provided, and a refund of other fees for services that USF is not providing.

DISCUSSION

While USF admittedly did not meet and confer with Plaintiffs before filing its demurrer as required by Code of Civil Procedure section 430.41, the Court does not believe there is any realistic prospect that an agreement could have been reached that would have resolved the objections raised in the demurrer, and accordingly will decide the demurrer on its merits.

At the outset, the Court declines to consider the declaration of Dr. Tyrone Heath Cannon. It is elementary that a demurrer can be used only to challenge defects that appear on the face of the complaint, or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) "No other extrinsic evidence can be considered." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) The Court likewise denies USF's request for judicial notice of its catalog, including the refund policy and the university's reservation of rights to modify its regulations and programs. "Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 [error to take judicial notice of parties' letter agreement on demurrer] (emphasis in original); see also *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [demurrer may not be turned into contested evidentiary hearing].) Plaintiffs do not refer to USF's catalogs or published policies in their complaint, nor do they allege that any statements in those materials form a basis for their claims. (Compare *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 828 ["[plaintiffs] contend that the University breached its express promise on its websites and its catalogues not to increase the [professional degree fee] for continuing students."].) They therefore are not properly considered by the Court on demurrer.

USF's demurrer to the claims asserted by Plaintiff Amber Kaiser, the parent of Plaintiff Jasmine Moore, on the ground that she lacks standing to assert claims on behalf of an adult

student is overruled. Plaintiffs do not allege that Ms. Moore was an adult when her Spring 2020 fees were paid and, as noted, the Court cannot consider extrinsic evidence on demurrer to determine that issue.

The Court overrules USF's demurrer to the first cause of action for breach of contract. "[T]he basic legal relationship between a student and a private university is contractual." (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 823-824; see also *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 10.) "By the act of matriculation, together with payment of required fees, a contract between the student and the institution is created." (*Id.* at 824.) Absent a formal agreement between the student and the university, the agreement is an implied-in-fact contract. "The terms of an express contract 'are stated in words,' while the terms and the existence of an implied contract 'are manifested by conduct.'" (*Id.* at 827.) Statements in university catalogues, student manuals, and registration materials may become part of the implied-in-fact contract. (*Id.* at 828-829.) Significantly at this stage of the proceedings, "the question whether the parties' conduct creates such an implied agreement is generally a question of fact." (*Id.* at 829.)

Plaintiffs have adequately pled each of the basic elements of a claim for breach of contract: (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Thus, Plaintiffs allege that through the admission agreement and payment of tuition and fees, they entered into a binding contract with USF. (Compl. ¶ 44.) Specifically, they allege that tuition for Spring semester 2020 was "intended to cover in-person educational services from January through May 2020." (*Id.* ¶ 45.) Finally, they allege that they have suffered damage as a direct and proximate result of USF's contractual breaches, including being deprived of "the in-person education, experience, and services . . . which they were promised and for which they have already paid." (*Id.* ¶ 51.) While it is true, as USF argues, that Plaintiffs do not identify any express or specific promise that was

breached, they allege that tuition and fees at USF are paid in exchange for, among other things, in-person coursework; face-to-face interaction and collaboration with professors, advisors, and peers; access to facilities such as libraries, laboratories, computer labs, and study rooms; access to technology, graphic design computer programs, and equipment; visits and tours of advertising agencies, including in-person presentations and interviews; student governance and student unions; extra-curricular activities, groups, intramural sports, and related activities; student art, cultures, church access, and other activities; social development, fraternal organizations, and independence; hands-on learning and experimentation; and networking and mentorship opportunities. (Compl. ¶ 33.)

Construing the complaint liberally, as required (Code Civ. Proc. § 452), these allegations are sufficient to state a claim for breach of an implied-in-fact contract. As one federal court recently concluded in a closely analogous case,

> Throughout the amended complaint, [plaintiff] alleges that the College's publications clearly implied that courses would be conducted in-person. The College's materials also touted its many resources and facilities—of which were located on the campus thereby implying in-person participation. These allegations are sufficient at this early stage, especially because Florida law recognizes that the college/student contract is typically implied in the College's publications.

(*Salerno v. Florida Southern College* (M.D. Fla. Sept. 16, 2020) --- F.Supp.3d ----, 2020 WL 5583522, at *5;[1] see also *Zumbrun*, 25 Cal.App.3d at 10-11 [allegations that USC contracted to give course consisting of a given number of lectures and a final examination in exchange for tuition and fees paid by plaintiff, and that professor refused to give all promised lectures and to conduct a final exam because of faculty strike protesting United States foreign policy in

[1] Other courts have begun to hand down rulings on initial motions to dismiss actions brought against public and private universities by students seeking tuition and fee refunds as a result of the COVID-19 pandemic. Those courts largely have denied those motions based on reasoning similar to that set forth here. (See, e.g., *Rosado v. Barry University Inc.* (S.D. Fla. Oct. 30, 2020 --- F.Supp.3d ----, 2020 WL 6438684; *Chong v. Northeastern University* (D. Mass. Oct. 1, 2020) --- F.Supp.3d ----, 2020 WL 5847626; *Waitt v. Kent State University* (Oh. Ct. Cl. Sept. 28, 2020) 2020 WL 5894543; *McDermott v. The Ohio State University* (Oh. Ct. Cl. Aug 24, 2020); *Cross v. University of Toledo* (Oh. Ct. Cl. July 8, 2020) 2020 WL 4726814.)

Cambodia, stated claim for breach of contract].) USF's arguments regarding damages and proximate cause raise factual issues that cannot be resolved on demurrer. (See *Zumbrun*, 25 Cal.App.3d at 11 [whether alleged breach "justifies refund of a portion of the tuition and fee allocable to the course is a matter of proof, under the present state of the pleadings, at trial in an appropriate forum"].)

In *Kashmiri*, the Court of Appeal affirmed summary judgment for plaintiff students in a class action against the University of California seeking injunctive and declaratory relief and damages after the university increased various fees. The court concluded that implied contracts were formed between the university and students, and that the university breached its contracts in two respects: by raising the professional educational fees for continuing students after promising on its website and in its catalogues that such fees would not be raised for the duration of the students' enrollment in the professional program; and by raising the educational fees for the spring and summer sessions in 2013 after the students had received bills specifying the exact amount to be paid. That case is closely instructive here.

Plaintiffs' allegations here are most comparable to the second claim in *Kashmiri*, that the university billed students for the spring and summer terms, but then increased the fees after the students had received their bills. (*Id.* at 841-848.) The court determined that "it was reasonable for the student to expect that once he or she received an actual bill for a specific amount to be paid by a particular date, and that bill did not indicate there could be any further change, the University had established the actual fee as reflected by the bill." (*Id.* at 844.) The university's general disclaimer on its website that it retained the right to increase the fees without providing any notice could not overcome the reasonable expectations of the parties at the time the contract was formed. (*Id.* at 842-843.) "[O]nce the student is told that he or she can enroll at a particular price and must pay that particular sum by a certain date, the student should reasonably be able to expect that fee has now become firm." (*Id.* at 848.) Thus, the University breached its contracts

with the students attending the two terms when it raised the educational fees for these terms after the students had received bills charging them a set fee to be paid by a particular date. (*Id.*)

Here, likewise, USF billed students such as Plaintiffs for tuition and fees for the Spring semester, and Plaintiffs allege they paid those amounts. It was reasonable for Plaintiffs to expect when they were billed for the Spring semester that they would receive the services, including in-person instruction and lodging in university residence halls, that were allegedly promised to them. When USF changed the nature of the educational and other services students reasonably expected to receive in exchange for their payments, it arguably breached its contracts with Plaintiffs and other students.

USF contends that although Plaintiffs have framed their claims as contractual in nature, they are actually attempting to challenge academic decisions regarding USF's "mode of instruction" (i.e., shifting from in-person to online), which amounts to a forbidden claim of "educational malpractice." (Dem. at 4-7.) The Court disagrees. As the *Kashmiri* court acknowledged, "it is well settled that contract law is not always rigidly applied, especially in actions challenging the academic decision of a university or a student's qualifications for a degree." (*Id.* at 825.) "Courts have applied contract law flexibly to actions involving academic and disciplinary decisions by educational institutions because of the lack of a satisfactory standard of care by which to evaluate these decisions." (*Id.* at 826; see also *id.* at 835 ["Courts have consistently refused to interfere with the educational curriculum and selection, retention, and conditions of employment of academic personnel, which is not at issue in the case before us."].) "Courts have, however, not been hesitant to apply contract law when the educational institution makes a specific promise to provide an educational service, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction." (*Id.*) This action, like *Kashmiri*, "does not involve what is essentially an educational malpractice claim or a decision that involves disciplinary discretion. . . . 'Ruling on this [fee dispute] would not require an inquiry into the nuances of educational processes and theories, but rather than objective

assessment of the University's performance of its promise." (*Id.* at 826-827.) Just as in *Salerno*, "this case is not about the quality of the [University's] education" or its decision to move to online learning; "This case is simply about an alleged promise to provide in-person learning that was allegedly breached." (2020 WL 5583522, at *5.)

USF also contends that its decision to suspend in-person instruction was "a reasonable response to emergency conditions and required by government orders" concerning the pandemic. (Dem. at 6:7-17.) That may well be, but it is not dispositive of Plaintiffs's claims at the pleading stage. "[E]conomic crises do not excuse performance on a contract. 'Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility.'" (*Kashmiri*, 156 Cal.App.4th at 839 [rejecting argument by University of California that state fiscal crisis constituted an emergency that excused its performance of a contractual promise not to raise certain student fees].)

Because the first cause of action states a claim for breach of contract, the Court need not address USF's additional argument regarding the included claim for breach of the implied covenant of good faith and fair dealing. A general demurrer may not be sustained as to a portion of a cause of action. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167; see also *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, 257 ["It is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory."].)

The Court sustains USF's demurrer to the second cause of action for violation of the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.*, with leave to amend. Plaintiffs apparently seek to predicate the UCL claim on a purported violation of the Consumer Legal Remedies Act (Compl. ¶ 58(a)), but do not actually allege any claim for violation of the CLRA or the factual basis for such a claim. Nor do Plaintiffs allege sufficient facts to state a claim under the UCL's "unfair" or "fraud" prongs. Plaintiffs do not allege that members of the public are likely to be deceived by the challenged conduct. (*Schnall v. Hertz Corp.* (2000) 78

Cal.App.4th 1144, 1167.) Nor do they allege (nor, presumably, could they) that USF's statements were fraudulent *when made*—i.e., before the pandemic. Finally, although Plaintiffs seek injunctive relief, they do not allege that USF is engaged in any *ongoing* conduct that could properly be enjoined. An injunction under the UCL "is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff." (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316.) Plaintiffs have leave to amend to clarify the factual basis for their UCL claim under one or more of the statutory prongs.

The Court sustains USF's demurrer to the third cause of action for conversion without leave to amend. "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) "Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. A generalized claim for money [is] not actionable as conversion." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.) "[A]ctions for the conversion of money have not been permitted where the amount of money involved is not a definite sum." (*Id.*)

Here, Plaintiffs are not seeking to recover all of the tuition and fees they paid to USF, but rather only an unspecified "prorated portion" of that tuition and fees. (Compl. ¶¶ 39(e) ["that portion of the tuition and fees attributable to the services that USF did not provide"], 70, 73.) Moreover, that prorated amount presumably is different for each Plaintiff (and every member of the putative class), depending on the tuition and fees each paid, whether such amounts were covered in whole or in part by grants or other forms of financial aid, whether they had lodging in USF residence halls and, if so, when they moved out, and the extent to which their individual undergraduate or graduate programs involved areas of concentration where in-person instruction

and access to technology is or is not crucial. (See Compl. ¶¶ 13, 14, 27.) Plaintiffs' counsel conceded at the hearing that the specific amount that was allegedly converted is "unknown." Thus, the complaint does not state a claim for conversion. (See *PCO, Inc.*, 150 Cal.App.4th at 395 [affirming summary judgment on conversion claim where "plaintiffs could only estimate the amount of cash" allegedly converted]; see also *Salerno*, 2020 WL 5583522, at *5 [dismissing conversion claim with prejudice where "an obligation to pay money, like [plaintiff's] claim for tuition reimbursement, is also insufficiently tangible to qualify as 'property' under these facts"] [applying Florida law].) Plaintiffs have not shown a reasonable likelihood that they could amend to overcome this defect.

USF's demurrers to Plaintiffs' claims in the fourth cause of action for quasi-contract and in the fifth cause of action for promissory estoppel are sustained with leave to amend. " '[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231-232.) "Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred here. Instead, plaintiffs' breach of contact claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract under the theory of unjust enrichment." (*Klein v. Chevron USA, Inc.* (2012) 202 Cal.App.4th 1342, 1389-1390.) The same is true here. (See Compl. ¶ 44 [alleging Plaintiffs "entered a binding contract with USF"].) Plaintiffs have leave to amend to allege facts supporting an alternative theory of recovery.

Likewise, promissory estoppel is an equitable doctrine that allows enforcement of a promise that would otherwise be unenforceable because of lack of consideration. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-902.) "The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to

whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" (*Id.* at 901.) Promissory estoppel is not available here because Plaintiffs allege that the underlying contract was entered into for consideration. (Compl. ¶ 45.) Again, however, Plaintiffs have leave to amend to plead such an alternative theory.

Finally, USF's demurrer to Plaintiffs' prayer for punitive damages and injunctive relief is unavailing. "[A] demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1562 ["a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint"]; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 163 [punitive damage allegations were not subject to demurrer].)

CONCLUSION

In the Spring of this year, USF, like countless other educational institutions in the United States and around the world, was confronted with an unprecedented public health crisis that dramatically affected its ability to continue holding classes and providing education as it had in the past. Nothing in this order is intended to suggest that USF did anything improper in acting as it did to shift from in-person to online instruction. The Court merely finds that Plaintiffs have pled certain viable causes of action. Whether Plaintiffs can prevail on those causes of action and, if so, the amount of tuition and fees which they may be entitled to recover, if any, present factual issues that will have to await decision on a complete record at a later stage of the litigation. (*Kerivan*, 147 Cal.App.3d at 229 ["plaintiff's possible inability or difficulty in proving the allegations of the complaint is of no concern."]; see *Salerno*, 2020 WL 5583522, at *1 ["[Plaintiff], a student, has alleged the elements of a breach of contract claim against Florida

Southern College in her amended complaint. At this early stage in the case, that is all that is necessary. The more difficult issues will come later, at the summary judgment stage."].)

Plaintiffs have 20 days leave to amend.

IT IS SO ORDERED.

Dated: November 12, 2020

HON. ETHAN P. SCHULMAN

JUDGE OF THE SUPERIOR COURT

CGC-20-584829 SAMANTHA BERLANGA, JASMINE MOORE AND AMBER KAISER VS. UNIVERSITY OF SAN FRANCISCO

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on November 12, 2020 I served the foregoing ORDER ON DEFENDANT UNIVERSITY OF SAN FRANCISCO'S DEMURER TO COMPLAINT on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

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